No. 393.

Brf. of Atty. Gen. C. Binney & Pradt

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
ANTHONY F. NAVARRE AND EIGHTY-nine other members of the Pottawatomie tribe of Indians. } No. 393.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This case came before the Court of Claims under the act of March 3, 1891, § 1 (26 Stats., 1010). By the treaty of June 5 and 17, 1846, proclaimed July 23, 1846 (9 Stats., 853), the various bands of Pottawatomies were gathered into one nation, and they sold to the United States the lands previously held by them, buying with a part of the proceeds a reservation in what afterwards

became the State of Kansas. This treaty contains the following words: "The said tribe of Indians giving assurance hereby of fidelity and friendship to the Government and people of the United States, and the United States giving at the same time promise of all proper care and paternal protection." After the Pottawatomies had settled on their reservation in Kansas, various members of them had stock and other property stolen by Indians of other tribes and white men, and also occasionally had fences, crops, etc., burned in consequence of the negligence of white men, or perhaps by design. These losses occurred from time to time down to the making of the treaty of January 28, 1867 (15 Stats., 533). Article X of this treaty provides as follows:

> It is further agreed that upon the presentation to the Department of the Interior of the claims of said tribe for depredations committed by others upon their stock, timber, or other property, accompanied by evidence thereof, examination and report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises.

Under the above provision the appellees presented their claims to an agent of the Interior Department, who reported the claims, with the evidence presented, to the Secretary of the Interior, by whom they were transmitted to Congress, in consequence of which transmittal Congress ultimately passed the jurisdictional act above referred to. (Rec. 11, 12.)

The Court of Claims found that seventy-two of the ninety claimants had suffered from depredations committed by others than the Pottawatomie tribe of Indians,

which depredations were committed by other Indians (to the extent of $5,890), as well as by white men, and included losses by fire (to the extent of $3,971.80) due to the negligence or design of white men. (Rec., 12–15.) On March 21, 1898, the Court of Claims gave judgment for these seventy-two claimants in the aggregate sum of $29,329.10, whereupon the United States took this appeal. (Rec., 23.)

ASSIGNMENT OF ERROR.

The Court of Claims erred—

1. In holding that the care and protection promised by the United States to the Pottawatomies, in the first article of the treaty of June 5 and 17, 1846, involved a greater liability, as regards losses of personal property, than the United States had assumed by the act of June 30, 1834, § 16 (4 Stats., 731).

2. In holding that the claims of the Pottawatomie tribe for depredations, referred to in the tenth article of the treaty of February 28, 1867, were not limited to claims under the said act of June 30, 1834, § 16.

3. In holding that the claims of the Pottawatomies, referred to the court below by the jurisdictional act, were not limited to claims under the said act of June 30, 1834, § 16.

4. In entering judgment in favor of the appellees in the sum of $29,329.10 (said sum including allowances for property taken by Indians and for destruction of property due to the negligence of white men), instead of the sum of $19,467.30.

BRIEF OF ARGUMENT.

This appeal is not directed to the entire subject-matter covered by the judgment of the court below. It is conceded that allowances to the extent of $19,467.30 were properly made for property taken, injured, or destroyed by the criminal acts of white men, but it is submitted that the allowances of $5,890 for property taken by Indians, and of $3,971.80 for property destroyed in consequence of the negligence of white men, or where no criminal act was proved, were not warranted by the jurisdictional act.

The jurisdiction of the court below over the present case was conferred by a provision in the act of March 3, 1891, § 1 (26 Stats., 1010), reading as follows:

> That the claims of certain individual members of the Pottawatomie Nation of Indians, their heirs or legal representatives, for the depredations committed by others upon their stock, timber, or other property, reported to Congress under the tenth article of the treaty of August 7th, 1868, be, and the same are hereby, referred to the Court of Claims for adjudication. And said court shall, in determining said cause, ascertain the amounts due and to whom due by reason of actual damage sustained.
>
> And all papers, reports, evidence, records, and proceedings relating in any way to said claims now on file or of record in the Department of the Interior or any other Department, or on file or of record in the office of the Secretary of the Senate or the office of the Clerk of the House of Representatives, shall be delivered to said court, and in considering the merits of the claims presented to the court all testimony and reports of special agents or other

> officers and other papers now on file or of record in the Departments of Congress shall be considered by the court, and such value awarded thereto as in its judgment is right and proper.

Jurisdiction over the same matter had previously been awarded by the act of March 3, 1885, § 1 (23 Stats., 372), but without any authority to consider anything but strictly legal evidence, and on that account, presumably, that act was not made use of by the claimants, so it need not be considered. The jurisdictional act refers to claims reported to Congress under the Pottawatomie treaty of February 28, 1867, proclaimed August 7, 1868 (15 Stats., 533), the authority to present such claims to Congress having been conferred by the tenth article, reading as follows:

> It is further agreed that upon the presentation to the Department of the Interior of the claims of said tribe for depredations committed by others upon their stock, timber, or other property, accompanied by evidence thereof, examination and report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises.

The words "examination and report shall be made to Congress of the amount found to be equitably due" are rather elliptical, and a more complete expression would be "examination shall be made thereof and a report shall be made to Congress of the amount found to be equitably due," the intention of the treaty obviously being that the Secretary of the Interior should pass upon all the claims, rejecting such as he considered inequitable and reporting only such as he considered equitable. The

Secretary did not follow this course precisely, but transmitted to Congress all the claims, with all the evidence submitted in support of them.

It was not intended, however, that the Secretary's action was to be final, as the object of his report was declared to be "in order that such action may be taken [by Congress] as shall be just in the premises." Although these claims were reported to Congress on December 20, 1871, Congress never finally did anything with them until March 3, 1885, when it gave the Court of Claims jurisdiction to adjudicate upon them, subsequently permitting it, by the act of March 3, 1891, to consider all the testimony, reports, and other papers in the case, although such testimony and documents were not of themselves legal evidence. Both the long inaction and the final action of Congress show its belief that the Secretary of the Interior had not made such complete examination of the claims as was desirable, and its conviction that only upon a thorough examination by a court of justice could a proper adjudication be made. The claims were therefore before the court below to determine the law and the facts and to enter judgment accordingly, without reference to any apparent conclusions of the Secretary of the Interior for or against any of the claims.

AS TO THE FIRST ASSIGNMENT OF ERROR.

These claims are the claims of the Pottawatomie tribe against the United States, within the contemplation of the treaty of February 28, 1867, "for damages committed by others upon their stock, timber, and other

property." In considering these claims, the first question that arises is why the Pottawatomies should have any claims at all against the United States Government for damages not committed by the officers of the Government. Undoubtedly the treaty of 1867 recognizes the existence of such claims, and their existence presupposes an assumption by the Government of liability for the acts of others than its own officers, for a claim against a person or a government must be founded upon some act or agreement of such person or government, and unless the Government had agreed to assume such a liability it could not have existed. When and to what extent was this liability assumed?

By the treaty of June 5 and 17, 1846 (9 Stats., 853), the Pottawatomies, who had previously lived as scattered bands on a number of separate reservations, were gathered into one nation and removed to a single reservation in Kansas. This reservation was in the Indian country, which was defined by the act of June 30, 1834, § 1 (4 Stats., 729), as being—

> all that part of the United States west of the Mississippi and not within the States of Missouri and Louisiana or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River and not within any State to which the Indian title has not been extinguished.

As a friendly tribe, resident in that country, the Pottawatomies were entitled to all the benefits of this act, including those of section 16, reading as follows:

> That where, in the commission by a white person of any crime, offense, or misdemeanor, within the

> Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment out of the Treasury of the United States for any such property if he, or any of the nation to which he belongs, shall have sought private revenge or attempted to obtain satisfaction by any force or violence: *And provided also*, That if such offender can not be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury, as aforesaid. (Act of June 30, 1834, § 16, 4 Stats., 731.)

The above section has been reenacted in the Revised Statutes (§§ 2154, 2155), but as the present claims accrued before such reenactment, the original section may properly be referred to. It is submitted that it defines the liability which the United States assumed for losses due to depredations committed upon the property of all friendly Indians within the Indian country, including the Pottawatomies, and that the "claims" referred to in the treaty of 1867 were intended to be confined to claims arising under this act, for by this act alone did the Government agree to be liable for the actions of others than its own officers. About two-thirds of the amount of

the present judgment are for claims of this character, but the balance does not come within the section, and it remains to be seen whether the court below was justified in extending the liability of the United States beyond what the section authorized.

It was contended in the court below that the liability of the Government in this case grew out of the act of May 18, 1830 (4 Stats., 411), providing for an exchange of lands with Indian tribes, and their removal to the west of the Mississippi, and for their protection in the possession of their new homes; and the references to this act in the opinion of the court below (Rec. 19, 20) seem to indicate its approval of the contention. An absolute answer to the contention, however, is found in the fact that the act of May 28, 1830, relates exclusively to exchanges of land made between the President of the United States and any tribe or nation of Indians, and the second section of this act, which authorized the President to make such exchanges, was repealed by the act of March 3, 1839, § 2 (5 Stat., 328), so that thereafter the statute could have no bearing except in regard to Indians living upon lands received by exchanges made with the President under its second section prior to its repeal. This is clear from the language of section 2114 of the Revised Statutes reenacting the provisions of sections 6 and 7 of the act of 1830, but applying them exclusively to the case of tribes or nations removed upon an exchange of territory under that act.

The words are:

> SEC. 2114. The President is authorized to exercise general superintendence and care over any tribe

> or nation *which was removed upon an exchange of territory under authority of the act of May twenty-eighth, eighteen hundred and thirty*, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," and to cause *such tribe or nation* to be protected, *at their new residence*, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

Had the revision been made before the treaty of 1867 it could not be contended for a moment that this section applied to the Pottawatomies, but in point of fact, as has just been shown, the law as to this was precisely the same before the revision.

The Pottawatomie nation did not obtain its reservation in Kansas by exchange under the act of 1830, but by the treaty of June 5 and 17, 1846, as already stated, so that the provisions of the act of 1830 can not possibly have applied to them. This act may therefore be wholly left out of consideration in the present case, and while the statement of the court below—that this act "indicates the policy of the United States * * * the general policy of the Government toward other Indians who might be removed beyond the Mississippi River, and thereby become subject to depredations of other hostile Indians or lawless white men" (Rec., 20)—may be true as regards those particular tribes who were removed to a "new residence" under that act, the general policy of the United States must be gathered from other statutes.

It is true that before the treaty of 1846 was made the Pottawatomies had been removed from the east to the west of the Mississippi, in accordance with the act of 1830, under the treaty of September 10, 1833 (7 Stats., 431), and various other subsequent treaties made with separate bands; but this fact does not warrant the contention of appellees' counsel that the rights which the Pottawatomies had acquired under the act of 1830, by virtue of that removal, remained to them after their subsequent removal to another residence, under a new treaty with which the act of 1830 had nothing to do.

The language of section 5 of the act of 1830 is explicit, "cause such tribe or nation to be protected, *at their new residence*, against," etc. The protection promised by this section was clearly intended to be local, and dependent upon the Indians being in a residence acquired under the act of 1830; and if that residence was subsequently given up, and another one acquired by a treaty not made under that act, this protection could no longer be invoked. Even if this could possibly be held to be otherwise, the words "interruption or disturbance," used in the act of 1830, can properly refer only to attempts to dispossess the Indians of the lands granted to them, and the promise of protection was a sort of covenant for quiet enjoyment. There is nothing whatever in these words to imply an assumption of any liability in regard to personal property, a liability which was ultimately assumed by the act of 1834.

While the court below held that the word "claims," as used in the treaty of 1867, was not limited to claims

under the act of 1834, it certainly did not deny that the Pottawatomies had claims under that act when the treaty of 1867 was made, nor did it deny that the Pottawatomie Reservation was within the "Indian country," as defined in section 1 of the act of 1834, and to which country the act applied. On the contrary, the court below says expressly (Rec., 20):

> This reservation was *beyond the protection of the civil laws* of the Government, and on that reservation they were more liable to be subject to depredations, not only from white people, but from *other uncivilized tribes of Indians.*

This language certainly indicates that the court below considered the Pottawatomie Reservation as within the Indian country, and the Pottawatomies themselves as entitled to *at least* the protection of the act of 1834, whatever other rights they might also have in addition. Appellees' counsel, however, now raise for the first time the objection that the act of 1834 never applied to the Pottawatomies and their reservation at all, because, they say, that reservation was not "Indian country" within the meaning of the act of 1834, the original Indian title thereto (that of the Kansas Indians) having been extinguished by the Kansas treaty of January 14, 1846 (9 Stats., 842). It is submitted that this strained and narrow construction of the act of 1834 can not stand.

It is true that in *Bates* v. *Clark* (95 U. S., 204) this court said:

> All the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil,

and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.

In *Bates* v. *Clark* a seizure of whisky and other goods had been made in Dakota Territory on land which had been relinquished to the United States by the Sioux Indians by the treaty of April 29, 1868, Article II (15 Stats., 635, 636), and had not been appropriated to Indian settlement by the United States after its acquisition, but had apparently become public land. It was, therefore, held, both by the supreme court of Dakota Territory and by this court, that the land in question had ceased to be Indian country within the meaning of the act of 1834. The only question then before this court was whether land to which the Indian title had been relinquished and which was not occupied by Indians, but by white men, under the public-land laws of the United States, continued to be Indian country; and if the statement above quoted from the opinion in *Bates* v. *Clark* was intended to refer to any other state of circumstances than that found in that case, it was clearly *obiter*.

It is submitted, however, that that opinion can not possibly have been intended to convey the meaning that where the United States obtained land in the Indian country from a tribe of Indians, and did not dispose of it as public land, but gave it to another tribe of Indians for Indian settlement, such land ceased to be Indian country within the meaning of the act of 1834. Such an interpretation of the act of 1834 would be manifestly unreasonable, unjust, and in conflict with the whole purpose and spirit of that act. The purpose of the act, as

shown by its title, was "to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers." This shows that the act was intended to operate upon all Indian tribes within the United States, except, as the first section shows, those residing within any State. There is absolutely nothing in the act to indicate that it was intended to operate only upon Indians living on lands which they held by original title, and not upon Indians living on lands granted them by the United States, who had previously acquired the same from some other tribe of Indians. Manifestly, both classes of Indians had precisely the same rights, and were entitled to precisely the same treatment at the hands of the United States. To make any distinction between them would have been most unjust, and no such distinction whatever is suggested in the act.

> The tribes for whom the act of 1834 was made were those semi-independent tribes whom our Government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, State and national, deal, with a few exceptions only, in their national and tribal character, and not as individuals. (*United States* v. *Joseph*, 94 U. S., 614.)

This language is manifestly applicable to the Pottawatomies, and it contains no suggestion that the act of 1834 was intended to apply only to Indians who had an original title to their lands, to the exclusion of those who had taken title from the United States.

If the policy of inducing Indians to migrate westward, and to grant to those from the east land previously acquired from western Indians, had not been adopted until after the act of 1834, the contention that this act did not apply to such Indians might possibly have more to support it; but that policy was in full force at that time, and hence the act of 1834 must be understood as having been enacted with the knowledge that very many Indian tribes were already, and others would be in the future, inhabitants of lands acquired from the United States, and to which the original Indian title had previously been extinguished. Hence the words in section 1 of the act of 1834, "to which the Indian title has not been extinguished," can not refer exclusively to the *original* Indian title, but must refer to any Indian title, whether original or acquired from the United States.

These words must properly be understood as equivalent to "rightfully occupied by any tribe or band of Indians;" and, so understood, the words must obviously have applied to the Pottawatomie Reservation as soon as it was granted to the Pottawatomie Nation by the treaty of June 5 and 17, 1846. In point of fact, as the land granted to the Pottawatomies had been obtained from the Kansas Indians by a treaty which had only been proclaimed on April 15, 1846 (9 Stats., 842), less than two months before the Pottawatomie treaty was made, it is almost certain that this land had been obtained from the Kansas Indians with the intention that a portion of it should continue to be devoted to the purpose of Indian settlement; but whether the grant to the Pottawatomies was in contemplation when the land was obtained from

the Kansas Indians, or was an afterthought, it is clear that the rights of the Kansas Indians and the Pottawatomies were the same, and that the duties of the United States toward them in respect of those rights did not differ. It would be most unreasonable to hold that because the lands remained for a very short time in the possession of the United States, their ultimate Indian owners did not have the same rights of protection under the act of 1834 that the original Indian owners of the land had had.

It should not be overlooked that although the opinion in *Bates* v. *Clark* uses the words "original title," the title which had been extinguished having been in that case an original one, these words are qualified by the further statement, "in the absence of any different provision by treaty or act of Congress." This statement may properly be understood as meaning that if, after the extinguishment of an original Indian title, the land was again inhabited by Indians, under any treaty or act of Congress, it would be "Indian country" within the intent of the act of 1834.

It is true that in *American Fur Company* v. *The United States* (2 Peters, 358) it was held that the act of March 30, 1802 (2 Stats., 139), did not apply to "territory purchased by the United States of the Indians, but frequented and inhabited exclusively by Indian tribes." The language of the act of 1802, in defining what should constitute Indian country, was very different from that of the act of 1834. The act of 1802 established certain boundaries, and provided that when those boundaries were changed the act should thereafter apply only within

the new boundary. The policy of granting to eastern Indians lands previously acquired from Indians in the west was not in contemplation when the act of 1802 was made, the Louisiana cession not having yet been made, and the change of boundaries contemplated in that act was a change in consequence of the acquisition of Indian lands by the United States and their ceasing to be occupied by Indians.

The act of 1802 not being in harmony with the subsequently adopted policy of removing Indian tribes from the east to the west, the necessity of an act which should apply to the country occupied by Indians, whether under an original or an acquired title, became obvious, and hence this act was repealed and the act of 1834, with its broader provisions, was adopted in its place. The case of *American Fur Company* v. *The United States* can, therefore, have no bearing upon a case arising under the act of 1834.

The case of *Ex parte Crow Dog* (109 U. S., 556) is also cited by appellees' counsel in support of the contention that the Pottawatomie Reservation was not in the Indian country, but that case has obviously no bearing here, the question there involved being in regard to the jurisdiction of the territorial court within the Sioux Reservation (which was indisputably "Indian country") under the terms of the Sioux treaty.

The reason of the court below, however, for disregarding the act of June 30, 1834, was, as already stated, not that that act did not apply to the Pottawatomie Reserva-

tion, but that the treaty of 1846 itself contained a broader promise of protection against depredations than is found in the act. The opinion says:

> The first article of the treaty of 1846 contains this stipulation: "It is solemnly agreed that the peace and friendship which so happily exists between the people of the United States and the Pottawatomie tribe of Indians shall continue forever, the said tribe of Indians giving assurance hereby of fidelity and friendship to the Government and people of the United States, and the United States giving at the same time *promise of all proper care and parental protection.*" Under this treaty the promise of care and protection given to these Indians is general in its terms and is restricted as against no particular parties; and under this treaty these Indians were removed by the United States to their reservation in the Territory of Kansas, where the depredations complained of in this suit were committed. This reservation was beyond the protection of the civil laws of the Government, and on that reservation they were more liable to be subject to depredations, not only from white people, but from other uncivilized tribes of Indians; therefore, this promise of care and protection was extended to them by the United States. (Rec., 20.)

It is submitted that there is not merely nothing to warrant this conclusion of the court below, but that it is even in direct conflict with the doctrine laid down by this court in *United States* v. *Perryman* (100 U. S., 235). The phrase "all proper care and parental protection" is not peculiar to the Pottawatomie treaty of 1846, but is obviously equivalent to the phrase "parental care and

protection" found in the Creek treaty of February 14, 1833 (7 Stats., 417), in the following article:

> ART. I. The Muskogee or Creek Nation of Indians, west of the Mississippi, declare themselves to be the friends and allies of the United States, *under whose parental care and protection they desire to continue*, and that they are anxious to live in peace and friendship, not only with their near neighbors and brothers, the Cherokees, but with all the surrounding tribes of Indians.

The above article is an express declaration on the part of the United States that the Creek Nation was then, and was to remain, under the "parental care and protection" of the United States, and this declaration being substantially equivalent to that in regard to the Pottawatomie Nation in the first article of the treaty of 1846, the liability intended to be imposed by these declarations must have been the same in both cases. According to the court below, this liability, as far as depredations were concerned, should not have been limited to that fixed by the act of 1834, either in the case of the Pottawatomies or in that of the Creeks, and yet in *United States* v. *Perryman* (100 U. S., 235) this court held that the liability of the United States for depredations committed upon the property of members of the Creek Nation was limited by the act of 1834, as reenacted in sections 2154 and 2155 of the Revised Statutes; and, further, that that act was to be strictly construed, so that the expression "white person" did not cover the case of a colored person, although a citizen of the United States. It is evident that the court would

have made precisely the same decision had the suit been by a Pottawatomie Indian, and hence that the court below erred in holding that the treaty of 1846 extended the liability of the United States for depredations beyond that imposed by the act of 1834.

Even apart from the effect of the *Perryman Case*, the conclusion of the court below could not be sustained. The words "all proper care and parental protection" do not necessarily include a promise of pecuniary liability for depredations committed by lawless men, whether whites or Indians; but even if such a promise could be understood from those words, it is only reasonable to suppose that what was meant was a liability within the limits of the act of 1834. By that statute the United States first undertook to make itself liable for depredations committed upon friendly Indians in the Indian country, and it fixed certain reasonable limits to that liability. These limits were that the depredations should have been committed by white men, in the commission of a crime, when full compensation could not be had from the offender, and when the Indian sufferer or his tribe had abstained from revenge and acts of violence. These were regarded by the Government of the United States as reasonable and proper limits, and defined the measure of the liability which it saw fit to assume toward all the friendly tribes living in the Indian country, whether indigenous there or brought there from the East, and there was nothing in the condition of the Pottawatomies to call for a greater liability to them than to the other tribes.

It can not be denied that in voluntarily assuming a liability within the limits of the act of 1834 the United

States acted liberally and generously, as well as reasonably. The United States does not undertake to recompense its own citizens for losses suffered by trespass, robbery, or arson, and it was under no obligation to recompense the Indians. In order, however, to prevent strife and bloodshed between red men and white, it did promise compensation for losses inflicted by white men, provided the Indians abstained from retaliation or violence. Moreover, it did undoubtedly, through its agents, and by the use of force when necessary, attempt to keep the various tribes within their several reservations, or the regions where they were understood to belong, and to preserve peace among them. This was, however, a task of great difficulty, in which absolute success was impossible, and accordingly the United States, recognizing the impossibility of wholly preventing these nomadic or seminomadic savages from preying upon others of their race, never undertook to assume a pecuniary liability for their depredations, as it did in the case of white men. How can it be said that, in refusing to assume such an unlimited liability, the United States acted other than reasonably and equitably?

AS TO THE SECOND ASSIGNMENT OF ERROR.

The court below held that the Pottawatomie treaty of 1867, under which the claims in the present case were presented to the Secretary of the Interior, did not contemplate restricting the Pottawatomies to claims under the act of 1834, both because the treaty contains nothing which it understands as words of limitation, and because "such claims could be as effectually prosecuted

under the act of 1834," without the remedy afforded by the treaty. It is submitted that neither of the reasons can be sustained. The treaty of 1867 uses the words "claims of said tribe," thus recognizing the claims as already existing, and as being claims against the Government of the United States. The treaty contains no new assumption of liability, but a clear recognition of an existing liability, for where there is no liability there can be no claim. Now the court below has found as a fact that nearly two-thirds, in value, of the losses which have been proved in this case, were due to depredations committed by white men, not the result of mere negligence, or in other words that they were losses which gave rise to claims under the act of 1834. It is therefore indisputable that as to these losses the treaty assumed no new liability but merely recognized an existing liability, and if as to these losses the words, "the claims of said tribe for depredations committed by others upon their stock, timber, or other property," meant, as they certainly did, existing claims under the act of 1834, what is there in the words quoted to show an intention to make the Government liable for other losses, for which no claim on the Government had previously existed?

Moreover, the view which the court below took of the treaty of 1867 was manifestly based upon its erroneous view of the act of 1830 and the treaty of 1846. The opinion says:

> This act [of 1830] and the subsequent treaty of 1846 clearly indicates the policy of the United States toward these Indians—the protection of the

> strong arm of the Government being promised them as against all persons or tribes of Indians. This being the undertaking on the part of the Government by its treaty with these Indians in 1846, and the general policy of the Government toward other Indians who might be removed beyond the Mississippi River, and thereby become subject to depredations of other hostile Indians or lawless white men, as indicated by the act of 1830, when the treaty of 1867 was made with this tribe of Indians, if the Government intended to withdraw or restrict the protection previously promised to these Indians, it would have indicated such purpose by incorporating into the terms of the treaty such restrictions, or withdrawal of protection. (Rec., 20.)

The meaning of the above statement obviously is that as the act of 1830 and the treaty of 1846 had extended the liability of the United States to the Pottawatomies, in regard to depredations, beyond the scope of the act of 1834, the treaty of 1867 must be understood as recognizing that extended liability; but, as already shown, the act of 1830 only applied to those tribes who received lands under it, and not to the Pottawatomies, while the treaty of 1846 could not, under the doctrine of the *Perryman* case, have extended the liability of the United States, as to depredations, beyond the scope of the act of 1834. The court below was undoubtedly right on one point, viz, that the treaty of 1867 did not alter the liability of the United States as to depredations, but left it precisely as it was before, and if, previous to that treaty, the liability was limited by the terms of the act of 1834, it remained so limited even under the treaty.

The argument that the tenth article of the treaty of 1867 was useless, unless it applied to other claims than those under the act of 1834, is equally without foundation. As already stated, nearly two-thirds of the losses which have been proved are certainly the subject of claims under the act of 1834. It is true that as the *Perryman Case* was a suit in the Court of Claims by an Indian, under sections 2154 and 2155 of the Revised Statutes, the present appellees could probably also have sued in the same court under the act of 1834. The court had existed, however, for ten years before the treaty of 1867 was made, and during the last four years of that period it had had authority to render judgment, yet the Pottawatomies had not availed themselves of its jurisdiction, and by 1867 a large part of these claims had become barred by the statute of limitations. Very possibly it had not occurred to anyone in 1867 that the Court of Claims was open to Indians for the enforcement of claims under the act of 1834; but apart from this it is clear that at that time the necessity of employing counsel to appear in Washington, and of taking testimony according to the strict rules of evidence, all parties in interest being then debarred from testifying, would have rendered it a great hardship to have required the Pottawatomies to sue in that court, even if the statute of limitations had not barred the greater portion of their claims. What was needed, or what appeared to be needed at that time, to effect the purposes of justice under the act of 1834, was not a large number of small suits by individual Indians in the Court of Claims, but an investigation by an agent of the Department of the

Interior on the spot, and this remedy was granted by the treaty of 1867. That it has not given the prompt relief that was anticipated was partly due to the error of the agent in disregarding the act of 1834, and partly to the inaction of Congress. The scheme was a good one, only it was not properly carried out.

The court below seems to have wholly misunderstood the words "depredations committed by others" in the treaty of 1867, assuming that the term "others," as used, "evidently embraces all persons other than members of the Pottawatomie tribe of Indians." (Rec., 19.) It may reasonably be asked, If the word "others" be so understood, what claim in law or equity, under statute or treaty, could the Pottawatomies possibly have had which that word excludes? What claim could they have had upon the United States for depredations committed by the Pottawatomies themselves upon each other? They were an Indian nation, governed by their own chiefs in accordance with their own traditional and recognized, if unwritten, laws. If they were robbed by each other, they had the power to punish the offenders, and the United States had absolutely no responsibility in the matter. If the word "others" means nothing more than "others than Pottawatomies," it has no effect whatever and had better have been omitted. It is, however, a cardinal rule of the construction of statutes and treaties that effect must be given to every word, wherever possible, and even without this rule the word "others" has a very clear and definite meaning. It means, taking it grammatically, "others than the parties to this treaty," and taking it practically, it means others than the only party to the

treaty, who, had it committed depredations upon the Pottawatomies, could have been justly liable to them. It means "*others than the United States.*" Now, the scope of the liability of the United States for depredations committed by others than the United States was already defined by the act of 1834, under which alone, as already stated, could "claims" on the part of the Pottawatomies have arisen; and the whole phrase, "The claims of said tribe for depredations committed by others upon their stock, timber, or other property," not only may, but, it is submitted, must properly be understood as equivalent to "claims arising under section 16 of the act of June 30, 1834, for depredations upon their stock, timber, or other property."

Another word in the treaty of 1867 which proved a stumbling-block in the path of the court below was the word "equitably," in the following clause:

> * * * Report shall be made to Congress of the amount found to be equitably due, in order that such action may be taken as shall be just in the premises.

The court below understands this clause to mean that—

> all equitable and just claims for depredations committed by white persons, or Indians belonging to tribes different from the Pottawatomie Nation, upon "their stock, timber, or other property," prior to the date of said treaty, should be proper claims to be presented to the Department of the Interior and Congress for its action thereon, and under such treaty Congress was to finally take such action on said claims as should be just in the premises. (Rec., 21.)

In other words, the idea of the court below is, to quote its own language in regard to the effect of the jurisdictional act (Rec., 21), that "to say that there is no legal right of recovery," under the act of 1834, "would be to contradict the terms" of the treaty.

The word "equitable," when used in a general sense, as "equitably" is used here, has two meanings. Understood with reference to natural justice and right, it means—

> Just, fair, and right, in consideration of the facts and circumstances of the individual case. (*Black's Law Dict.*)

Understood with reference to proceedings in courts of equitable jurisdiction, it means—

> Existing in equity; available or sustainable only in equity, or only upon the rules and principles of equity. (Ibid.)

Now, the treaty of 1867 was not concerned with remedies available in courts of equity, or based upon the rules and principles of equity jurisdiction. No Indian could sue the United States in a court of equity on account of "depredations committed by others," either under the act of 1834 or any other act. The treaty provided a remedy by executive and Congressional action, and hence the word "equitably" must mean "justly, fairly, and rightly, in consideration of the facts and circumstances of the particular case." This does not mean that the liability of the United States was to be extended beyond the limits within which it had agreed, by the act of 1834, to be liable, but that its liability, existing by that statute alone, was to be ascertained "justly, fairly,

and rightly," without regard to the technical rules of pleading or evidence as then established by law, but with due consideration of the facts and circumstances of each particular case and free from the bar of the statute of limitations. The treaty did not provide that the claims were to be equitable in the sense of not being warranted by statute, but that they were to be "found to be equitably due," i. e., ascertained in an equitable way, on the principles of justice and fairness.

AS TO THE THIRD ASSIGNMENT OF ERROR.

The court below further says:

> While the right to render judgment on such of the claims as are shown to be just is rested by the claimants on treaties alone, we think there is a clear indication of liability on the part of the United States from the phraseology of the acts referring the claims for adjudication. These mean that that judgment must be rendered if the claims are found by the proof to be equitably due. To say there is no legal right of recovery would be to contradict the terms of the statute. (Rec., 21.)

The jurisdictional act of March 3, 1891, did undoubtedly authorize the appellees to present their claims without regard to the rules of evidence as established by law, and in that way it materially furthered their recovery of whatever might be justly due them, but it is submitted that while this act removed all barriers to the ascertainment of the actual liability of the United States, it in no way extended the scope of that liability beyond what it had been under the treaties of 1867 and 1846, and

the act of 1834. The acts of 1885 and 1891 authorize the court below to "ascertain the amounts due and to whom due by reason of actual damage sustained," but the court below has rightly held that the word "due" means due at the date of the treaty of 1867, and has rejected all claims for subsequent losses. (Rec., 15, 16.) All the claims that were "due" at the date of the treaty of 1867 were due under the act of 1834, and there is nothing in the jurisdictional act to indicate any intention to recognize any others.

It is therefore submitted that the judgment of the court below should be reversed, and that that court should be ordered to enter a new judgment for all claims found due under section 16 of the act of June 30, 1834.

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